BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

DECISION OF THE BOARD

In the Matter of the Petitions for Redetermination Under the Hazardous Substances Tax Law of TECHALLOY COMPANY, INC. *Petitioner*

Appearances:	
For Petitioner:	Lawrence L. Hoenig Attorney at Law Margaret Rosegay-Kott Attorney at Law Rona H. Sandler Attorney at Law
For Department of Toxic Substances Control:	Dennis Mahoney Staff Counsel
For Department of Special Taxes and Operations, State Board of Equalization:	Janet Vining Senior Tax Counsel

This Decision considers the merits of petitions for redetermination, filed pursuant to Revenue and Taxation Code Section 43301, of a hazardous waste facility fee, imposed by Health and Safety Code Section 25205.2, for fiscal years 1986–87, 1987–88, 1988–89, and 1989–90. The Board heard the petitions for redetermination on July 28, 1992, in Sacramento, California, and took the matter under submission. The Board redetermined the matter on January 29, 1993, and issued notices of redetermination to Petitioner on March 11 and March 16, 1993.

The issue before us is whether a hazardous waste disposal facility that has ceased accepting hazardous waste for disposal, but has not completed the activities included in its approved closure plan, is subject to the facility fee imposed in Health and Safety Code Section 25205.2. We hold that it is.

BACKGROUND

Techalloy Company, Inc. (''Petitioner'') owns and operates a plant in Perris, California, which produces high quality specialty steel wire for the aerospace and related industries. Prior to December 30, 1985, Petitioner utilized a surface impoundment for on-site disposal of hazardous wastewater generated by its operations. Petitioner applied for and received interim status from the federal Environmental Protection Agency for the surface impoundment on November 18, 1980, and, on April 6, 1981, the Department of Toxic Substances Control (''Department'', then a program within the Department of Health Services) issued Petitioner a state interim status document (''ISD'').

Petitioner ceased discharging hazardous wastewater to the surface impoundment by December 30, 1985, in part because of statutory changes which restricted the disposal of hazardous wastes into surface impoundments, and in part because its federal ISD was revoked by operation of law on December 30, 1985 based on its inability to provide required financial assurances.

On September 24, 1985, Petitioner submitted to the Department its draft closure plan for the surface impoundment and two other impoundments that had been taken out of service earlier. The Department approved a revised plan on September 24, 1987. On January 9, 1989, at Petitioner's request, the Department approved further modifications of the closure plan. Petitioner commenced closure activities in February 1989, which included the stabilization and encapsulation of sludge remaining in the ponds and the construction of an impervious cap over the area formerly occupied by the ponds. The closure activities were completed on July 18, 1989. Petitioner and Petitioner's certified engineer submitted certifications of closure to the Department in August 1989. The Department approved the certifications of closure on November 1, 1989.

Petitioner contends that it does not owe the hazardous waste disposal facility fee for any of the fiscal years in question.

In March 1986, Petitioner began treating its hazardous waste in tanks. At the hearing on this matter, Petitioner conceded that, if the Board found that it did not owe the hazardous waste disposal fee for any of the years at issue, it would be subject to the fee for a small hazardous waste treatment facility for such years.

FISCAL YEARS 1986–87 AND 1987–88

The Legislature first imposed the hazardous waste facility fee in fiscal year 1986–87. During fiscal years 1986–87 and 1987–88, Health and Safety Code Section 25205.2(a) provided that:

> . . . each operator of a facility shall pay a facility fee for each state fiscal year, or any portion thereof, to the board based on the size and type of facility, . . .

In addition, ''disposal facility'' was defined in Section 25205.1(b) as ''a hazardous waste facility used for the disposal of hazardous waste.'' Section 25205.1(c) defined a ''facility'' to mean ''a hazardous waste storage, treatment, or disposal facility, including a resource recovery facility or waste transfer station, which has been issued a permit or a grant of interim status . . .''

The above-quoted version of Section 25205.2 does not specify when a facility's liability for the facility fee ends. We agree with the Department's position that the facility fee continues to be due until the facility is certified ''clean-closed'', that is, until the Department approves the facility's certification that it has completed all activities required in its approved closure plan. We find this position to be a reasonable interpretation of the statute.

The Health and Safety Code requires the Department to regulate the management and handling of hazardous waste in the state, and the Legislature imposed the facility fee to help fund the Department's regulatory program. The facility fee is deposited in the Hazardous Waste Control Account, and the Department draws from this Account to cover the cost of operating the regulatory program. We find that the facility fee is not in the nature of a ''business tax'' which is imposed on a business in relation to the revenue it produces. Instead, the facility fee is a fee imposed on the operators of facilities that manage hazardous waste, which is used to insure the protection of human health and safety and the environment from any damage which could result from such management of hazardous waste.

The Health and Safety Code and the Department's regulations require that a facility which intends to close must submit a closure plan which indicates how the facility will manage any hazardous waste remaining at the site. After the Department approves the closure plan, it must oversee the implementation of the plan and, finally, review and approve the facility's certification that all the necessary activities have been completed. The Department has significant responsibilities concerning the implementation of a closure plan and approval of a closure certification. We find that the Legislature intended that the Department's activities be funded from the continued imposition of the facility fee throughout this period.

We note that the Department's expenses during the period when a facility's closure plan is implemented may not correspond precisely with the fees collected from the facility. The Legislature imposed the annual facility fee in order to fund the Department's costs of regulating facilities during all stages of operation, including the closure phase. The costs of regulation may vary from one stage to another, just as some facilities receive more or less oversight from the Department than others of the same size and type. The Legislature provided, however, that the fee would be the same for all facilities of the same size and type.

Section 25205.2 imposes the facility fee on the ''operator'' of a ''facility''. We find that Petitioner continued to be the operator of a disposal facility after it ceased disposing of waste at the site.

The term ''operator'' is used in both the Health and Safety Code and the Department's regulations governing the closure process, indicating that the overall operation of a facility concerns more than the mere acceptance or disposal of waste, and includes the implementation of a closure plan.

The words ''used for'' in Section 25205.1(b)'s definition of a hazardous waste disposal facility do not restrict the definition to only those facilities which actively accept or dispose of hazardous waste, but include facilities that have been used for the disposal of hazardous waste. The Department continues to be responsible for regulating facilities after they have ceased accepting waste for disposal, and such facilities continue to be subject to standards and requirements imposed by the Health and Safety Code and the Department's regulations. The Health and Safety Code sections and Department regulations concerning the closure process make reference to ''facilities''. It is therefore

clear that a disposal facility continues to meet Section 25205.1(b)'s definition throughout the implementation of its closure plan.

In fiscal years 1986–87 and 1987–88, Health and Safety Code Section 25205.1(c) defined a ''facility'' as a ''hazardous waste storage, treatment, or disposal facility, . . . which has been issued a permit or a grant of interim status by the department . . . '' While Petitioner's federal ISD was revoked on December 30, 1985, the ISD issued by the Department continued in effect. On January 1, 1989, Section 25200.5(f) was added to the Health and Safety Code, stating that any land disposal facility which lost its federal ISD would be deemed to have lost its state interim status as well. Petitioner's state ISD was thus revoked as of January 1, 1989. However, we find no basis for applying Section 25200.5(f) retroactively. Therefore, throughout the two fiscal years at issue, Petitioner was operating under a grant of interim status from the Department.

Our finding concerning Petitioner's state interim status is not altered by Health and Safety Code Section 25159.5(b). That section required that the federal Environmental Protection Agency's regulations would be deemed to be the Department's regulations, until the Department received full authorization from the federal EPA to administer a hazardous waste regulatory program in lieu of the federal program, except that any state statute or regulation which was more stringent or extensive than a federal regulation would supersede the federal regulation. We find that the state's statutes and regulations concerning permitting and interim status continued in effect after the adoption of the federal statute which caused the revocation of Petitioner's federal interim status.

We find that Petitioner is liable for the facility fee for a hazardous waste disposal facility for fiscal years 1986–87 and 1987–88, since Petitioner operated a disposal facility under a grant of interim status from the Department, and had not yet completed the closure activities required in its approved closure plan.

FISCAL YEAR 1988–89

Fiscal year 1988–89 brought a change in the definitions in Health and Safety Code Section 25205.1 and in the imposition of the fee in Health and Safety Code Section 25205.2. We find that these changes did not terminate Petititoner's liability for the facility fee for a hazardous waste disposal facility during this fiscal year.

Section 25205.1(b)'s definition of a ''disposal facility'' was deleted, and the general definition of a ''facility'' in Section 25205.1(c) was amended to define a facility as ''any structure, and all contiguous land, used for the treatment, transfer, storage, resource recovery, disposal, or recycling of hazardous waste . . .'' This definition was also expanded to include not only those facilities which had been issued or deemed to hold permits or grants of interim status, but also those facilities which were ''operated in such a manner'' as to be required to obtain permits or grants of interim status.

On January 1, 1989, Petitioner's state ISD was revoked by operation of Health and Safety Code Section 25200.5(f). We find that the revocation of Petitioner's state ISD did not affect its liability for the facility fee. First, as discussed above, we see no basis for applying Section 25200.5(f) retroactively, and Petitioner's state ISD therefore was in

effect for the first half of the fiscal year. Section 25205.2 required that every operator of a facility pay a facility fee for each fiscal year, ''or any portion thereof'', and Petitioner's ISD was in effect for a portion of the fiscal year.

In addition, the definition of a ''facility'' in effect during fiscal year 1988–89 included facilities which were operated in a manner that required them to obtain permits or grants of interim status. We find that Petitioner continued to meet the definition of a ''facility'' during fiscal year 1988–89 because it remained subject to the Department's regulatory oversight for purposes of completing its closure activities. The Department's regulations require a facility to have a permit or interim status document throughout the implementation of its closure plan. Therefore, Petitioner met the definition of a ''facility'', even though its state ISD had been revoked by operation of law.

In addition to the change in the definition of a ''facility'', subsection (c) was added to Section 25205.2 as follows:

> . . . a person who is issued a variance by the department from the requirement of obtaining a hazardous waste facilities permit or grant of interim status, or a person who is in a closure period approved by the department pursuant to Article 9 (commencing with Section 25200) and Article 12 (commencing with Section 25245), is not subject to the fee, for any fiscal year following the fiscal year in which the variance or closure was granted or approved by the department.

We find that, in adopting subsection (c), the Legislature codified the Department's position that the facility fee continues to be due until the Department has approved a facility's completion of the activities included in its approved closure plan.

Health and Safety Code Section 25205.2(c) stated that a person who was ''in a closure period approved by the department'' was not subject to the facility fee for any fiscal year following the fiscal year in which the ''closure was . . . approved by the department.'' We find that the Legislature's reference to the ''closure period approved by the department'' is a reference to the period which begins when the facility starts to implement a closure plan which has been approved by the Department. Health and Safety Code Section 25246 requires each owner or operator of a hazardous waste facility to submit a facility closure plan to the Department. The Department reviews each plan and approves it if it complies with all relevant state and federal regulations. After the closure plan is approved and the closure activities included in the plan have been completed, the facility must submit a certification to the Department indicating that such activities have been completed. The Department's acceptance or approval of the certification completes the closure period.

We further find that the Department's approval of the certification is the ''approval of closure'' referred to in Section 25205.2(c). By the use of different terms—''closure period'' and ''closure''—we assume the Legislature intended different meanings. In addition, the Department's oversight and regulatory responsibilities are heightened during the facility's implementation of its closure plan, and we believe that the Legislature intended the facility fee to continue to be due throughout this period in order to compensate the Department for costs incurred in fulfilling its responsibilities.

Our finding concerning the meaning of ‘‘approval of closure’’ is supported by a later amendment to subsection (c). In fiscal year 1989–90, the subsection was amended to provide that a facility was not subject to the facility fee for any fiscal year following the fiscal year in which the closure was approved by the Department or in any fiscal year in which the facility had completed all activities necessary for the Department to ‘‘approve the closure, including, but not limited to, submittal of a certification that these activities are completed to the department’’. The Legislature used the same term—‘‘closure’’—in the versions of subsection (c) effective in fiscal years 1988–90 and 1989–90. As the latter version makes clear, the approval of a ‘‘closure’’ includes the certification that the activities included in the closure plan have been completed.

One further legislative change should be noted. Health and Safety Code Section 25205.8, which was adopted in fiscal year 1988–89 and was effective only during that year, stated:

> (a) In addition to the fees imposed pursuant to Sections 25174, 25205.2, and 25205.5, the department shall establish fees, based on historical workload standards, to be assessed for each permit application, application renewal, facility closure, and facility variance granted when a facility requests any of these services.

The adoption of Section 25205.8 does not alter our decision concerning Petitioner’s liability for the hazardous waste facility fee in fiscal year 1988–89. Section 25205.8 gave the Department the authority to assess a fee ‘‘in addition’’ to the facility fee if, for example, it was required to perform duties in excess of its usual day-to-day oversight of hazardous waste facilities. The Department’s regular oversight activities were funded partially by the facility fees at issue in this matter. We find no indication that the Legislature intended the fees described in Section 25205.8 to replace those assessed in other sections of the Health and Safety Code.

Petitioner was liable for the hazardous waste disposal facility fee for fiscal year 1988–89, because it held an ISD for part of the fiscal year and, when that ISD was revoked, it continued to operate a disposal facility in a manner which required it to obtain a permit or grant of interim status. In addition, although Petitioner was in a closure period approved by the Department, it had not yet completed the activities set forth in its closure plan and the Department had not yet approved its closure.

FISCAL YEAR 1989–90

As discussed above, section 25205.2(c) was amended during this fiscal year to provide that a person in an approved closure period was not subject to the facility fee for any fiscal year following the fiscal year in which closure was approved or

> . . . in any fiscal year in which the facility has completed all activities necessary for the facility to be closed in accordance with the approved closure plan, including, but not limited to, submittal of a certification that these activities are completed to the department.

In November 1989, Petitioner submitted to the Department its certification that it had completed the closure activities included in its approved closure plan. We therefore find that Petitioner was not subject to the facility fee for a disposal facility in fiscal year 1989–90. However, as noted above, Petitioner conceded that it operated a small hazardous waste treatment facility during that fiscal year and was subject to the appropriate treatment facility fee.

For the reasons set forth in this Decision, the petitions for redetermination for calendar years 1986–87, 1987–88 and 1988–89 are redetermined without adjustment. The petition for redetermination for calendar year 1989–90 is granted in part, and the determination for that fiscal year is redetermined to $40,000, which is the hazardous waste facility fee applicable to a small treatment facility.

Adopted at Sacramento, California, this 30th day of September, 1993.

Brad Sherman, Chairman
Matthew K. Fong, Member
Ernest J. Dronenburg, Jr., Member
Windie Scott, Member
Attested by: Burton W. Oliver, Executive Director